

Right to Know Advisory Committee
May 30, 2012
Meeting Summary

Convened 9:40 a.m., Room 438, State House, Augusta

Present:

Sen. David Hastings
Rep. Joan Nass
Perry Antone
Joe Brown
Richard Flewelling
AJ Higgins
Judy Meyer
Linda Pistner
Harry Pringle

Absent:

Mike Cianchette
Ted Glessner
Mal Leary
Bill Logan
Mike Violette

On Telephone:

Shenna Bellows
Kelly Morgan

Staff:

Peggy Reinsch
Colleen McCarthy Reid

Introductions

Senator Hastings called the meeting to order and asked all the members to introduce themselves. He welcomed everyone back for a new year of activities.

Summary of Second Regular Session, 125th Legislature's FOA actions in 2012

Staff reviewed the Legislature's actions during the 125th Legislature's Second Regular Session related to Advisory Committee recommendations and other freedom of access issues.

The Legislature enacted 2 pieces of proposed legislation that incorporate the Advisory Committee's recommendations:

- LD 1465, An Act to Amend the Laws Governing Freedom of Access, *enacted as Public Law 2011, chapter 662*
- LD 1804, An Act to Implement the Recommendations of the Right to Know Advisory Committee Concerning Public Records Exceptions, *enacted as Public Law 2011, chapter 524*

Staff specifically noted that the Legislature has provided funding for a full-time ombudsman position, funding a 0.5 position in the Supplemental Budget bill, PL 2011, c. 655, Sec. A-3 and providing the additional funds for a full-time position in PL 2011, c. 662 (LD 1465). Due to the different effective dates for the two laws, the Attorney General's Office has authorization to hire a ½ time position beginning July 1, 2012. Linda Pistner reported to the Advisory Committee that the AG's Office has submitted the necessary paperwork to the budget office for approval and will move forward with advertising the position as soon as possible. The additional funding for the full-time position is expected to become available in September. Ms. Pistner noted that the functions of the Ombudsman will be guided by the enabling law in Title 5, Section 200-I, including responding to inquiries from the public and government agencies, conducting education

and training, resolving complaints, providing advisory opinions and reporting annually to the Legislature and Advisory Committee. Ms. Pistner invited the Advisory Committee to provide comments on the qualifications and functions of the Ombudsman.

One bill, LD 1805, An Act to Implement Recommendations of the Right To Know Advisory Committee Concerning a Public Records Exception for Proposed Legislation, Reports and Working Papers of the Governor (supported by a majority of the Advisory Committee) was not enacted by the Legislature.

Staff also reviewed 4 bills containing proposed public records exceptions that were reviewed by the Judiciary Committee:

- LD 1627, An Act Regarding Birth, Death and Marriage Data, *enacted as Public Law 2011, chapter 511*
- LD 1138, An Act to Amend the Tree Growth Tax Law and the Open Space Tax Law, *enacted as Public Law 2011, chapter 618*
- LD 1470, An Act to Evaluate the Harvesting of Timber on Land Taxed under the Maine Tree Growth Tax Law, *enacted as Public Law 2011, chapter 619*
- LD 958, Resolve, to Authorize the Legislature to Contract for an Independent Review to Evaluate the Essential Programs and Services Funding Act, *enacted as Resolve 2011, chapter 166 effective May 29, 2012*

Staff noted that the enacted laws adopted the recommendations of the Judiciary Committee related to the public records exception, except for one bill, LD 1138. That law was enacted without following the Judiciary Committee's recommendation regarding the proposed exception relating to the confidentiality of a forest management and harvest plan provided by a landowner seeking open space tax treatment. Staff also noted that the exceptions related to the tree growth and open space tax laws are in Title 36 and are scheduled to be reviewed (along with other exceptions in Title 36) by the Advisory Committee this year.

Existing exceptions review process

Staff explained that the Advisory Committee is scheduled to review the existing exceptions in Titles 26 through Title 39-A and distributed a chart listing the exceptions. Staff also reminded the Advisory Committee about two items that the Advisory Committee and Judiciary Committee have not made final recommendations on:

- Title 22, section 8754, related to sentinel event reporting by hospitals; and
- Title 22, sections 1696-D and 1696-F, related to the Community Right-to-Know Act.

The Advisory Committee agreed to review the exceptions in Titles 26 through 39-A and the tabled items in Title 22 and to refer them to the Public Records Exception Subcommittee.

Continuing projects

The Advisory Committee reviewed the list of continuing projects.

PL c. 264: email and other communications of elected/public officials. This potential project was referred to the Advisory Committee by the Judiciary Committee. The Judiciary Committee requested guidance from the Advisory Committee related to the storage, management and retrieval of public officials' communications, especially email, for purposes of the Freedom of

Access laws. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee.

Use of technology in public proceedings (participation from remote locations). The Legislative Subcommittee has developed draft legislation governing the use of technology in public proceedings to allow participation of members from remote locations. There are several state agencies with specific statutory provisions that allow public proceedings to be conducted by telephone or other means that would be affected by the proposed draft legislation. The Subcommittee has not solicited input on the draft from these agencies yet. The Advisory Committee agreed to continue working on the draft legislation and refer it to the Legislative Subcommittee.

Training and education for public officials. The Advisory Committee discussed whether additional training and education issues need to be addressed as a result of the new requirement that government entities have a designated public access officer. The Advisory Committee determined that, since the law allows the designation of an existing employee, governmental entities will not have significant issues in complying with the law. The Advisory Committee did not refer this issue to a subcommittee.

Templates for drafting specific confidentiality statutes. The Public Records Subcommittee and Legislative Subcommittees worked with staff and former extern, Sean O'Mara, to develop drafting templates for confidentiality exceptions related to consumer and business records submitted to state agencies. Draft templates have been prepared, but input from state agencies is needed. The Advisory Committee agreed to refer this issue to the Legislative Subcommittee.

Application of FOA laws to Maine Public Broadcasting Network. The Advisory Committee was asked to consider the application of FOA laws to the Maine Public Broadcasting Network by a member of the press. Under current law, MPBN board meetings are defined as public proceedings, but the definition of public record does not specifically address MPBN records. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee. Staff will also research the legislative history of the amendment to the definition of public proceeding to include MPBN board meetings.

Criminal History Record Information Act (CHRIA) --- update

Staff reported that the Criminal Law Advisory Commission did not bring the proposed draft revision of the Criminal History Record Information Act (CHRIA) to the Legislature this session. Staff noted that issues raised by the judicial system may have caused the delay. The Advisory Committee will invite the Criminal Law Advisory Commission to brief them on the status of the CHRIA revision at a future meeting.

Bulk records --- update

Staff summarized the Law Court's opinion in the MacImage case decided March 27, 2012 and provided a copy of the law enacted by the Legislature (PL 2011, c. 518) which makes permanent the statutory fees determined to be reasonable by Law Court. The Law Court found that the specific statute in Title 33 regarding the registries controlled the dispute over the reasonableness of the fees charged by the registries—not the general language of the FOAA. As the Advisory Committee did not make a specific recommendation related to bulk data given the unresolved court case, the Advisory Committee discussed whether there are additional issues to be discussed now that the Law Court has rendered its decision. The Advisory Committee decided that it would

be worthwhile for the Bulk Data Subcommittee to revisit the issue of bulk data in light of the court decision to close the “loop” on the discussion.

Law School Externship – update

Linda Pistner reported that Katherine (Katie) Lybrand has been selected as the Advisory Committee’s Law School extern for the upcoming fall semester. Katie will be a third-year student at the University of Maine School of Law and interned last summer with the Attorney General’s office. Ms. Pistner acts as supervisor throughout the externship. The Advisory Committee and staff look forward to working with Katie beginning in September.

Suggested topics and projects for discussion

The Advisory Committee discussed 3 suggested topics and projects to determine if the Committee wanted to add the topics to the 2012 agenda.

Letter from Freedom of Information Coalition related to encryption of radio transmissions between law enforcement and public safety personnel. The Advisory Committee discussed a letter from the Freedom of Information Coalition requesting that the RTKAC examine the freedom of access issues raised by the potential encryption of public safety and law enforcement communications. The Advisory Committee noted that this may raise significant concerns among stakeholders and members will need to spend time talking with stakeholders before developing any recommendations. The Advisory Committee agreed to review this issue and to create a subcommittee to consider this single issue.

Letter from Rep. Nelson related to parental privacy in Maine schools. The Advisory Committee discussed a letter from Rep. Mary Nelson asking the RTKAC to consider whether Maine law should be clarified to ensure the confidentiality of home email addresses of parents of students. The Falmouth School Department received a FOA request for the email addresses of all parents of students in the school system. While the Falmouth School Department believes the email addresses are confidential under the Federal Family Educational Rights and Privacy Act because they are maintained as part of confidential student records, Rep. Nelson’s letter notes that the issue is not clear under state law. The Advisory Committee agreed to review this issue and refer it to the Legislative Subcommittee.

Penalties for release of confidential information. Staff reported that a State agency made an inquiry about whether there are any statutory penalties if an agency released confidential information as part of a request for information pursuant to the Freedom of Access Act (FOAA). Staff noted that there is no general statutory provision, but that there are a few examples of statutes specifically relating to certain agencies that assess penalties for the “intentional or knowing” release of confidential information.

The Advisory Committee declined to review the issue at this time, noting that they believed that the release of confidential information by state agencies was not a problem.

Relationship between Ombudsman and RTKAC

The Advisory Committee briefly discussed the relationship of the Ombudsman with the RTKAC and whether the Advisory Committee should refer this issue for further discussion to a subcommittee. Ms. Pistner stated that she expected that the Ombudsman would attend RTKAC meetings and report about issues and inquiries on a regular basis. Harry Pringle agreed that the

Ombudsman should not be a RTKAC member but that sharing of information between the Ombudsman and the RTKAC would be important. Staff pointed out that the statute requires the RTKAC to maintain the FOA website; it may be useful at some time in the future to discuss whether the Ombudsman should take over those duties. Sen. Hastings reminded everyone that the Ombudsman is required to report annually to the RTKAC so he expects there will be an ongoing working relationship between the two. The Advisory Committee decided to defer any additional discussions of the role and functions of the Ombudsman until the position is filled.

Subcommittees: members and duties

The Advisory Committee agreed to keep the same subcommittees and membership as last year, but added one additional subcommittee to review the issues raised by the Maine Freedom of Access Coalition related to radio encryption. The membership of each subcommittee is noted below.

Bulk Records Subcommittee

Mike Cianchette, Chair
Perry Antone
Joe Brown
Richard Flewelling
Judy Meyer
Sen. Hastings*
Rep. Nass*

Encryption Subcommittee

Linda Pistner, Chair
Perry Antone
Joe Brown
AJ Higgins
Mal Leary
Judy Meyer
Sen. Hastings*
Rep. Nass*

Legislative Subcommittee

Judy Meyer, Chair
Mike Cianchette
Richard Flewelling
Ted Glessner
Mal Leary
Bill Logan
Kelly Morgan
Linda Pistner
Harry Pringle
Sen. Hastings*
Rep. Nass*

Public Records Exception Subcommittee

Shenna Bellows, Chair
Perry Antone
Joe Brown
AJ Higgins
Linda Pistner
(Ted Glessner, if needed)
(Harry Pringle, if needed)
Sen. Hastings*
Rep. Nass*

Not assigned as of 5/30/12: Mike Violette

*denotes ex officio status, do not count for a quorum

Future Meetings

The Advisory Committee scheduled the following meetings for 2012:

- Thursday, October 11, 2012 at 1:00 pm, Room 438, State House;
- Thursday, November 15, 2012 at 1:00 pm, Room 438, State House; and
- Thursday November 29, 2012 at 1:00 pm, Room 438, State House.

The following subcommittee meetings were also scheduled:

- Radio Encryption Subcommittee, Monday, July 16, 2012 at 9:00 am;
- Public Records Subcommittee, Monday, July 16, 2012 at 1:00 pm; and
- Legislative Subcommittee, Thursday, July 19, 2012 at 9:00 am.

Senator Hasting adjourned the meeting at 11:45 a.m.

Respectfully submitted,
Peggy Reinsch and Colleen McCarthy Reid

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